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CONFIDENTIAL FORMAL ADVISORY OPINION

February 13, 2015

Re: The Interpretation of Criminal Penalties for Concealing or Failing to Disclose Information and Providing False Information on a Statement of Economic Interest AO-E-15-001

Dear Requester:

This is in response to your request for a formal advisory opinion. You have asked the Commission to interpret provisions of the State Government Ethics Act ("the Ethics Act"), G.S. Chapter 138A, which assign criminal penalties for the concealment of or failure to disclose information on the Statement of Economic Interest ("SEI") and for providing false information on an SEI. You also seek guidance concerning whether a filer's obligation to report sources of "income" over \$5,000 on the SEI refers to gross or net income.

This opinion was adopted by the State Ethics Commission at its February 13, 2015, meeting.¹

I. Brief Conclusion.

G.S. 138A-24(a)(3) requires the reporting of the sources of a filer's gross income over the \$5,000 reporting threshold. G.S. 138A-26 applies to an SEI filer's failure to disclose required information on an SEI. G.S. 138A-27 applies to an SEI filer's report of false information on an SEI. The filing of an SEI "No Change Form" affirms that a filer had no changes to his or her required disclosures since the last filing of the SEI "Long Form."

II. Facts.

You are the Ethics Liaison for a State entity. You request that the Commission provide guidance on an SEI filer's obligation to list sources of income on the filer's SEI "Long Form."

¹ Please see the enclosure entitled "Formal Advisory Opinions Issued by the State Ethics Commission" for further information regarding the protections offered to individuals receiving those opinions.

You also seek guidance on the legal significance of the filing of an SEI “No Change Form” in a year in which a filer had an additional source of income over \$5,000. You also ask the Commission to interpret the enforcement provisions of G.S. 138A-26 and G.S. 138A-27.

III. Applicable Statutory Provisions.

A. SEI Disclosure Requirements.

G.S. 138A-22(a) requires that every covered person file an SEI with the Commission no later than April 15th of each year. Those covered persons are required to file a SEI Long Form, which requires disclosure of all information prescribed in the Ethics Act upon their initial appointment, election, or employment and for subsequent years in which they have had changes to those disclosures. However, if a covered person has had no changes in those disclosures since the last filing of the Long Form, he or she is permitted to file a No Change Form.

Both the SEI Long Form and the No Change Form require that a covered person complete an affirmation “that the information provided in this Statement of Economic Interest and any attachments hereto are true, complete, and accurate to the best of ... [the filer’s] knowledge and belief.” They also require that the filer acknowledge the criminal penalties associated with the failure to disclose required information and with providing false information on an SEI, which are more fully set forth below.

The No Change Form also requires that a filer confirm that those disclosures made on the prior year’s SEI continue to be accurate. For example, the 2015 No Change Form states as follows:

I hereby affirm that I have reviewed my most recently filed 2014 Statement of Economic Interest and that as of December 31, 2014, my responses continue to be true, correct, and complete to the best of my knowledge and belief.

The SEI covers various categories of statutorily-required disclosures, including a requirement that the filer disclose:

The name of each source (not specific amounts) of income of more than five-thousand dollars (\$5,000) received during the previous year by business or industry type, if that source is not listed under subdivision (2) of this subsection. Income shall include salary, wages, professional fees, honoraria, interest, dividends, rental income, and business income from any source other than capital gains, federal government retirement, military retirement, or social security income.

G.S. 138A-24(a)(3). The SEI also asks filers who did not disclose any income to check a box affirming that they had “no reportable income over \$5,000 in [the prior year].”

G.S. 138A-26 provides that it is a Class 1 misdemeanor if a filing person “knowingly conceals or knowingly fails to disclose information that is required to be disclosed on a statement

of economic interest....” G.S. 138A-27 makes it a Class H felony for a filing person to “provide false information on a statement of economic interest as required under this Article knowing that the information is false” The word “knowingly” is defined as “with knowledge, consciously, willfully, and intentionally.” *Black’s Law Dictionary* (5th ed. 1979).

Both G.S. 138A-26 and G.S. 138A-27 provide that in addition to the criminal penalties referenced above, a filing person who fails to disclose or provides false information on an SEI “shall be subject to disciplinary action under G.S. 138A-45.”

IV. Analysis.

You ask the Commission to first determine whether a filer is required to report gross or net income in response to the SEI questions requiring a listing of “income” over \$5,000. The term “income” is not defined in the Ethics Act. However, considering the principles of transparency underlying the SEI disclosure provisions, the Commission concludes that G.S. 138A-24(a)(3) requires the reporting of gross income.²

You also ask the Commission to distinguish the elements of a violation of G.S. 138A-26, which refers to a filer’s knowing failure to disclose particular information, and G.S. 138A-27, which refers to a filer knowingly providing false information on an SEI.

The Commission has reviewed those statutory penalties and has determined that the penalty established by G.S. 138A-26 is applicable to a filer’s failure to list required information on his or her SEI. Thus, for example, if a filer receives income during the prior year over the \$5,000 disclosure threshold and the filer fails to report the source of that income on his or her SEI that would be a violation of G.S. 138A-26, which specifically refers to the omission of information.

If, on the other hand, the filer disclosed the source of certain income but misidentified that source, that would be a violation of G.S. 138A-27, which specifically refers to an affirmative misstatement. In addition, if a filer checked the box indicating that he or she “had no reportable income over \$5,000 in 2014” when in fact the filer did have reportable income, that too would be an affirmative misstatement and therefore a violation of G.S. 138A-27.

You further seek the Commission’s guidance on the legal significance of a filer’s submission of an SEI No Change Form in a year in which the filer had a new source of income over the \$5,000 threshold that was not previously disclosed. The Commission has determined that the impact of filing that No Change Form would be a failure to disclose that source and a violation of G.S. 138A-26. Moreover, filing a No Change Form in subsequent years in which the filer continues to receive that income would be a continuing failure to disclose required information and thus a continuing violation of G.S. 138A-26.

² “The purpose of disclosure of the financial and personal interests by covered persons is to assist covered persons ... identify and avoid conflicts of interest ... between the covered person’s private interests and ... public duties. It is critical to this process that ... covered persons examine, evaluate, and disclose those personal and financial interests that could be or cause a conflict of interest ... between the covered person’s private interests and the covered person’s public duties.” G.S. 138A-21.

Finally, you have asked whether a finding of criminal liability is a prerequisite to taking disciplinary action for a filing person's failure to disclose or a filing person's listing of false information on an SEI. The Commission has determined that a criminal finding is not a prerequisite to such disciplinary action.

V. Closing.

Thank you for contacting the State Ethics Commission. Please do not hesitate to call the Commission's staff if you have any questions about the foregoing formal advisory opinion.

Formal Advisory Opinions Issued by the State Ethics Commission
Pursuant to the Ethics Act

Upon the written request of a public servant or legislative employee, G.S. 138A-13(a) of the State Government Ethics Act (“the Ethics Act”) authorizes the State Ethics Commission (“Commission”) to issue formal advisory opinions on the “meaning and application” of the Ethics Act “and the public servant’s or legislative employee’s compliance therewith.” Reliance upon a formal advisory opinion immunizes the public servant or legislative employee making the request from (1) investigation by the Commission, except the alleged violation of criminal law while performing his or her official duties, (2) adverse action by his or her employing entity, or (3) investigation by the Secretary of State. G.S. 138A-13(a2).

In addition, the Commission may issue formal advisory opinions on “specific questions involving the meaning and application” of the Ethics Act. G.S. 138A-13(a1).

Once issued by the Commission, formal advisory opinions are published in a redacted format on the Commission’s website within 30 days of issuance. G.S. 138A-13(d). Otherwise, requests for advisory opinions, the opinions themselves, and all materials related to the opinions are confidential and are not public records. G.S. 138A-13(e).